# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 304.

ALPHONSE DESMARE, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MAY 28, 1875.

# SUPREME COURT OF THE UNITED STATES.

## No. 304.

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ALPHONSE DESMARE, APPELLANT,

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APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.—No. 2802.

*Petition.—Filed June 26, 1867.*

To the honorable the judges of the Court of Claims:

Your petitioner, Alphonse Desmare, a citizen of Louisiana, and a resident of the city of New Orleans, respectfully shows:

That in the year 1863 he was the owner of five hundred and fifty-six bales of cotton, his own property, which was at Opelousas, in the parish of St. Landry, in the State of Louisiana, and that some time in April, in the said year 1863, the said bales of cotton were captured and taken by officers of the United States Army; that is to say, by Captain Noyes, of the 41st Regiment of Massachusetts Volunteers; Captain H. S. Adams, of the 41st Regiment of Massachusetts Volunteers; Captain C. H. Cowell, of the 13th Regiment of Connecticut Volunteers, and acting assistant quartermaster; Captain V. Moffit, 120th Regiment Ohio Volunteers, and acting assistant quartermaster; and Second Lieutenant Artemus Adams, 11th Regiment Wisconsin Volunteers, and acting commissary subsistence; that the said cotton was by said officers sent to Bane's Landing in the above-named parish of St. Landry, and was there delivered to Captain W. F. Perkins, of the 3d division, 19th army corps, who was acting post-quartermaster at Bane's Landing, by whom it was shipped, in accordance with orders from General N. P. Banks, commanding the Department of the Gulf, upon Government transports, to the city of New Orleans, consigned to the chief quartermaster at that city, and was sold, and the net proceeds placed in the Treasury of the United States, to an amount of which your petitioner is not accurately informed, but which he believes to be not less than $256,105.

2 And your petitioner shows that he was the owner of said cotton, and is justly entitled to the proceeds thereof, under the third section of an act approved March 3, 1863, ch. 120; and he claims in this suit the proceeds thereof, after deducting all lawful expenses.

And your petitioner shows that he has at all times borne true allegiance to the Government of the United States, and has never aided, abetted, or given any aid, comfort, or encouragement to rebellion against the Government, and that his post-office address is New Orleans, Louisiana.

W. B. WEBB,
*Counsel for Claimant.*

WASHINGTON CITY, D. C.

DISTRICT OF COLUMBIA,
*Washington County, to wit:*

Before the undersigned, a notary public in and for the county of Washington, D. C., on this second day of May, 1867, personally appeared Samuel V. Niles, the attorney of the petitioner, and, being duly sworn, deposeth and saith that no assignment or transfer of the claim in the foregoing petition mentioned, or of any part thereof, or any interest therein, has been made, and that the petitioner is justly entitled to the amount therein claimed, from the United States, after deducting all just credits and offsets, and that he believes the facts as stated in the said petition are true.

[L. S.] N. CALLAN,
*Notary Public.*

In the United States Court of Claims, December term, A. D. 1866.

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And the said defendants, by their solicitor, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of two hundred and fifty-six thousand one hundred and five dollars, alleged net proceeds of five hundred & fifty-six bales of captured cotton, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

E. P. NORTON,
*Solicitor for the United States.*

Filed Nov. 30, 1867.

And for a further plea to the said petition the said defendants say that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant d d not, "within two years after the suppression of the late rebellion, prefer his claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled, "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
*Assistant Attorney-General.*

Filed July 17, 1869.

And for a further plea to the said petition the said defendants say, that the said claimant ought not to have or maintain his aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of his said petition, was an alien, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of his said action against defendants.

T. LYLE DICKEY,
*Assistant Attorney-General.*

Filed July 17, 1869.

4 In the Court of Claims.

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At a Court of Claims held at the Capitol in the city of Washington, the fifth day of April, A. D. 1875, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant's petition be dismissed.

By the court.

A true copy of record.

5 In the United States Court of Claims.

ALPHONSE DESMARE
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To the hon. the judges of the United States Court of Claims:

The petition of Alphonse Desmare respectfully represents that he is informed and believes there is error to his prejudice in the judgment lately rendered against him in the above-entitled cause in this hon. court, April 5, 1875, from which he desires to appeal.

Wherefore he prays that a' appeal may be allowed him from said judgment to the Supreme Court of the United States returnable in conformity to law, with all farther general and special relief.

DURANT & HORNER,
*Attys. for Claimant.*

Filed May 17, 1875.

6 In the Court of Claims.

ALPHONSE DESMARE
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Ordered, that the prayer for the allowance of an appeal to the Supreme Court be allowed as prayed for.

By the court.

MAY 17, 1875.

7 United States Court of Claims.

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*Findings of fact.*

1. The claimant before the war had his domicile in the city of New Orleans, La., where he resided, and was a partner with one Laforest, under the style of Laforest & Desmare, commission-merchants, and he was residing there also on the 19th of January, 1866. There is no evi-

dence of any change of said domicile, or of a dissolution of said partnership, nor is there any evidence as to where the claimant was on the 27th of April, 1862, when the United States military forces took possession of New Orleans, or before that date, during the war, or afterward, until October, 1862, when it is proved he was in the parish of Saint Landry, La., purchasing cotton, which is the subject of this action, and acting as agent of the rebel government for the exchange of confederate bonds for confederate notes, for which latter purpose he had an office at Opelousas, in said parish. Said parish was within the rebel lines until April, 1863, when it was taken possession of by United States forces under General Banks.

2. Between the 1st of October, 1862, and the month of April, 1863, the claimant, in person, purchased within said parish, of different persons, two hundred and sixty-eight bales of cotton, and paid for the same in confederate money. All of said cotton was seized by officers of the United States upon the entry of their military forces into said parish, was turned over to agents of the Treasury Department, sold, and the net proceeds, to the aggregate amount of $51,456, are now in the United States Treasury.

3. Said claimant and one Dupré, jointly and personally, purchased within said parish, March 3, 1863, eighty-four bales of cotton, for which they gave their notes, with security. These notes were paid after the war, one-half by the claimant and one-half by said Dupré. This cotton was seized by officers of the United States in April, 1863; was turned over to Treasury agent and sold, and the net proceeds thereof, to the amount of $16,128, are in the United States Treasury.

4. The claimant has failed to prove that any other cotton owned by him was seized by officers or agents of the defendants.

CONCLUSIONS OF LAW.

1. The claimant's domicile, found to have been in the city of New Orleans before the war and not proved to have been changed, is presumed to have continued and been in that city when the purchases of cotton were made by him within the rebel lines, as set forth in the findings.

2. The claimant's domicile being in the city of New Orleans, he is presumed to have been there personally until he is proved to be elsewhere; and the claimant, not showing that he was absent from
8 the place of his domicile when the city was captured, April 27, 1862, it is presumed he was there at that time, and subsequently crossed the Federal lines about the time he is proved to be in the parish of Saint Landry.

3. The purchases of cotton by the claimant, under the circumstances set forth in the findings, were void as against the law and public policy of the United States, and he acquired no title to the cotton thereby.

RICHARDSON, J., delivered the opinion of the court:

The facts proved in this case, as found by the court, leave no doubt that, at the time of making the purchases within the rebel lines during the rebellion, the claimant's domicile was in the city of New Orleans, then, and ever after during the war, held by the military forces of the United States. Before the war his domicile was in that city, and he resided and carried on there a commercial business as a partner in a commission-house. There is no evidence of any change of domicile or of a dissolution of his partnership. According to well-settled principles, the presumption of law is that a domicile, once acquired, continues until

it is proved to be changed, and that the burden of proof is upon him who relies upon such change. It was not until October, 1862, that the claimant is proved to be within the rebel lines, in the parish of Saint Landry, where he was then acting as agent of the rebel government for the exchange of confederate bonds for confederate notes, and had an office for that purpose at Opelousas, and at the same time was purchasing, on his own account, the cotton claimed in his petition. This is not inconsistent with his still maintaining his domicile in New Orleans, especially as it does not appear that he had a fixed home or residence of any kind or a place of general commercial business in the parish of Saint Landry or elsewhere within the rebel lines. In January, 1866, he is found again residing in New Orleans, and in May, 1867, according to his petition, duly sworn to, he was a resident of that city, and then claimed that he had at all times borne true faith and allegiance to the United States. In all the proceedings, from the original petition to the findings of fact, there is no claim set up that he ever had a fixed residence or domicile in any other place than New Orleans. That being the case, the main question of law presented for our determination is whether or not the purchases of cotton made by the claimant personally within the rebel lines, while his legal domicile was in New Orleans, were valid and not in violation of public policy. If they were valid, then the claimant is entitled to recover; otherwise, judgment must be for the defendants.

When the Federal forces obtained complete control of New Orleans, soon after the 27th of April, 1862, the inhabitants were no longer held to be in insurrection, and commercial intercourse between them and the inhabitants of other parts of the United States, not in rebellion, was permitted, while between them and the inhabitants of such portions of Louisiana and other States as remained in control of the insurgents, such intercourse was strictly prohibited. The President, in pursuance of authority conferred upon him by the non-intercourse act of July 13, 1861, (12 Stat. at Large, 257,) on the 16th of August of that year, issued his proclamation (12 Stat. at Large, 1262) declaring that the inhabitants of the States of Georgia, South Carolina, Virginia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, (except the inhabitants of that part of the State of Virginia lying west of the Alleghany Mountains, and of such other part of that State and the other States before named as might maintain a loyal adhesion to the Union and the Constitution, or might be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of the
9 insurgents,) were in a state of insurrection, and all intercourse between the same and the inhabitants thereof, with the exceptions aforesaid, and the citizens of other States and other parts of the United States, was unlawful and would remain unlawful until such insurrection should cease or be suppressed. The Supreme Court has held that "military occupation, to work this exception, must be actual; that is to say, not illusory, nor imperfect, not transient, but substantial, complete, and permanent;" and that "the military occupation of the city of New Orleans may be considered as substantially complete from the date of" the proclamation of General Butler of May 1, 1862, which was issued on the 6th of May, and which "declared the city to be under martial law, and announced the principles by which the commanding general would be guided in its administration." The Venice, (2 Wall., 258.) On the 12th of May, 1862, the President, by proclamation, (12 Stat. at Large, 1263,) declared that the blockade of the ports of Beaufort, Port Royal, and New Orleans should cease and determine from and after the first day of June then next, and that commercial intercourse, with some

exceptions as to articles contraband of war and other matters, might be carried on with those ports under certain specified limitations. On the 2d of April, 1863, the President revoked the exceptions contained in his proclamation of August 16, 1862, but declared the same States therein mentioned to be in insurrection, "except the forty-eight counties in Virginia designated as West Virginia, and except also the ports of New Orleans, Key West, Port Royal, and Beaufort in North Carolina." This did not alter, but confirmed the previous status of New Orleans. Thus the citizens of New Orleans were from the 1st of May, 1862, to the close of the rebellion, to all intents and purposes, in law, inhabitants of loyal territory, with no more rights to have commercial intercourse with the public enemies in insurrectionary States and parts of States than had the inhabitants of New York, Boston, or Philadelphia.

The time of the claimant's going from New Orleans into the parish of Saint Landry, whether before or after the 27th of April, 1862, when the United States forces took possession of that city, and it ceased to be insurrectionary territory, is not expressly proved, but must be determined by the presumption of law; and as he might have different rights, and be subject to different obligations to some extent, if he went before or after that date, we will consider his claim under each of those aspects of the case.

In the case of The William Bagley, (5 Wall., 408,) Mr. Justice Clifford, in the opinion of the court, which was delivered by him, says, "The duty of a citizen, when war breaks out, if it be a foreign war and he is abroad, is to return home without delay; and if it be a civil war, and he is resident in the rebellious section, he should leave it as soon as practicable, and adhere to the regularly established government." Applying this rule to the present case, if the claimant were in the parish of Saint Landry when the city of his domicile was taken possession of by the Federal Army, and became loyal territory by virtue of the exception in the proclamation which we have cited, it was his duty to leave as soon as practicable, return to his home, give in his adhesion to the established government, and transact no further business with the public enemies beyond the Federal lines.

In Ealer vs. The United States, (5 C. Cls. R., 708,) this court held that a "citizen of a loyal State, involuntarily detained during the rebellion within the confederate lines, may, with his earnings, buy and sell, acquire, and dispose of property, so long as he gives neither aid nor comfort to the rebellion, and so long as he brings nothing within and carries nothing without the confederate lines.

10 It does not appear that the claimant involuntarily remained within the rebel lines, or that it was not practicable for him to return to New Orleans at any time within the six months which preceded his purchases, after the capture of that city. Voluntarily remaining in the territory of the enemy, in violation of his duty to his country, conferred upon the claimant no rights of commercial intercourse with the disloyal inhabitants of that territory.

But the proof being that the claimant's domicile, residence, and commercial business were in New Orleans before the war, we think the presumption of law is that he remained there personally until about the time he is proved to be in the parish of Saint Landry. The burden of proof is upon him to overcome that presumption, as it is to overcome the presumption that his domicile, once proved to have been there, continued in that city. This presumption is greatly strengthened by the fact that it does not appear that he was in that parish until six months after the capture of New Orleans, or that he had any place of business

there except an office for the exchange of confederate bonds for confederate notes. Where was he during those six months? And where was he when the city of his domicile was captured? These were facts within his own knowledge and his own means of clear and unquestionable proof. As he offered no evidence to the contrary, we are led to the conclusion that he was in the place of his domicile when it was taken possession of by the Federal Army; that he subsequently crossed the military lines and went into the territory of the insurgents, where he made the purchase as set forth in the findings. And that brings his case directly within the principles laid down by the Supreme Court in Lapène and Ferré, (17 Wall., 602.)

The learned judge who delivered the opinion of the court in that case says:

"All commercial contracts with the subjects or in the territory of the enemy, whether made directly by one in person, or indirectly through an agent, who is neutral, are illegal and void. This principle is now too well settled to justify discussion. (Woolsey's International Law, s. 117; Montgomery vs. United States, 15 Wall., 395.) No property passes and no rights are acquired under such contracts.

"In March, 1862, the whole of the State of Lousiana was in the military possession of the confederate forces. Intercourse between the inhabitants of the different portions thereof was legal, and contracts made between them were legal.

"On the 27th of April, in the same year, the city of New Orleans was captured by the military forces of the United States, and thereafter remained under their control. From that time commercial intercourse between the inhabitants of that city and the inhabitants of other portions of the State of Louisiana which remained under the confederate rule became illegal. Ordinarily the line of non-intercourse is the boundary-line between the territories of contending nations. The recent war in the United States was a civil-war, in which portions of the same nation were engaged in hostile strife with each other. The State of Louisiana, although one of the United States, was under the control of the confederate government and their armies, and was an enemy's country. While the city of New Orleans was under such control it was a portion of an enemy's country. When that city was captured by the forces of the United States, the line of non-intercourse was changed, and traffic before legal became illegal. The line was that of a military occupation or control by the forces of the different governments, and not that of State lines. This principle was expressly decided in Montgomery's Case, above cited."

11 This review of legal principles by the learned judge applies with much force to the case now under consideration, and upon those principles of law, the facts in this case are more decidedly against the claimant's right to recover than were those in Lapène and Ferré. In that case the claimants in New Orleans, when the whole State of Louisiana was rebel territory, sent their clerk into the interior with money wherewith to purchase for them sugar and cotton, and afterward, but while the rebels still held New Orleans, forwarded by a messenger other money to be used by him for the same purpose. After the capture of that city the clerk purchased the cotton which was the subject of suit. While the court held that the agency was terminated by the hostile position of the parties, it did not rest the decision upon that point alone, but held also that the "purchase gave effectual aid to the enemy by furnishing to them the sinews of war. It was forbidden by the soundest principles of public law. The purchaser obtained no title to

the cotton, and has no claim against the Government for its capture." And yet the clerk was within rebel territory before and after the time of the capture of New Orleans, received no money thereafter, but made the purchases with money which was delivered to him when such delivery was legal and valid. In the present case the claimant, in like manner a citizen of New Orleans, either remained within the rebel lines where he was at the time of the capture of that city, as did the agent of Lapène and Ferré, or went there subsequently, and made his purchases with money which it does not appear that he obtained by the collection of debts or the sale of property. If the hostile position of the parties, caused by the capture of New Orleans, terminated the agency of Lapène & Ferré's clerk, so it terminated the right of the claimant in this case to have commercial intercourse with the inhabitants of the parish of Saint Landry. Grossmeyer's Case, (7 C. Cls. R., 129, and 9 Wall., 72;) Ensley's Case, (6 C. Cls. R., 282, and 9 C. Cls. R., 11; Lane's Case, (8 Wall., 185;) Millar's Case, (8 C. Cls. R., 407;) Montgomery's Case, (15 Wall., 395;) Coppelt vs. Hall, (7 Wall., 542.)

Although public enemies, within their own disloyal territory, have a right to make contracts among themselves, and such contracts are held valid, we do not think the claimant acquired, as against the United States, any right of commercial intercourse with such enemies, by leaving the city of his domicile and residence after it had been six months in possession of the Federal forces, and, by the President's proclamation, was no longer held to be in insurrection, crossing into insurgent territory, and there accepting office under the confederate government, as agent for the exchange of its bonds for currency. If thus accepting office under the confederacy rendered his purchases valid, then he was in better condition than other inhabitants of New Orleans who remained loyal; and by committing two disloyal acts he gained a right of action against the United States which he would not have possessed had he committed but one of them.

Since the foregoing was written, the Supreme Court has rendered a decision in Warren Mitchell vs. The United States, which, in connection with the case of Lapène and Ferré, supports the conclusions which we had reached. Mitchell lived in Louisville, Ky., where he was engaged in business. In July, 1861, he procured a pass from the military authorities and went through the Army lines into insurrectionary territory, where he remained until the latter part of 1864. While in the Confederate States he transacted business, collected debts, and purchased cotton, which was the subject of the suit. The court held that his domicile remained in Louisville; that, as an inhabitant of a loyal State, it was unlawful for him to make contracts with the inhabitants of disloyal States; that his purchase of the cotton involved the same legal consequences as if it had been made by an agent whom he
12 sent to make it; and that he acquired no title to the cotton so purchased. The court say that the case turns upon the point that Mitchell had his domicile in loyal territory while his purchases were within the lines of the enemy, and they re-affirm the principles that a domicile once acquired is presumed to continue until it is shown to have been changed, and that where a change of domicile is alleged, the burden of proving it is upon the person making the allegation.

On principle and authority, we are of opinion that this claimant is not entitled to recover, and his petition is dismissed.

LORING, J., dissenting:

In this case the only objection made to the petitioner's recovery is

that the sales of cotton to him were made between enemies, and are therefore absolutely void. And as the purchases were made in confederate territory and of its citizens, the only question is whether the petitioner himself was a confederate or a loyal man at the times the sales were made.

Now, the fact is found that at the times of the sales the petitioner was an officer or agent of the confederate government for the negotiation of its bonds, and stationed at Opelousas, in Louisiana, and had an office there. So that at the times of the sales he was an active member of the rebel organization, and personally engaged in aiding it in its resistance to the Government. In the very words of the Constitution defining treason against the United States, "he was levying war against them, and adhering to their enemies, giving them aid and comfort." And he was in disloyal territory, stationed among and dealing with its citizens in these sales. And I think these facts necessarily fix the status of the petitioner as to loyalty or disloyalty then, wherever and whatever he might have been at any previous time. And I know of no case in this court or in the Supreme Court that had decided that an officer of the confederate government, active in its service, and stationed in its territory, was then and there a loyal man.

And the case shows that the petitioner was a citizen of a disloyal State, and was himself personally disloyal, and it is found as a fact that there is no evidence in the case that during the war he was ever in loyal territory till nearly four years after these sales were made, viz, January 19, 1866, when he was pardoned for disloyalty in the city of New Orleans, then in the military occupation of the United States. And I do not concur in the second conclusion of law, for I think the statement of facts furnishes no persumption conflicting with the petitioner's disloyalty. It is stated in the finding of facts that the petitioner was a resident of New Orleans before the war, which began April 19, 1861, and ordinarily a residence once shown is presumed to have continued. But that presumption is precluded here, for the voluntary residence of the petitioner in New Orleans after the war began would have been in him a crime and statute evidence of it. And a crime cannot be presumed from a fact which is not a crime. And he who alleges a crime must prove it.

So it is stated that the petitioner was in New Orleans January 19, 1866. But that date is taken from the oath on which his pardon for disloyalty was conditioned, and when taken in connection with his oath, as it must be, it can furnish no presumption of previous loyalty.

On the whole case, I think that the sales in question are valid in law, because the petitioner and those with whom he dealt in them were confederates in fact and name, and all alike enemies of the United States when the sales were made in October, 1862. And I think that is the time to which the question of the validity of the sales is to be referred, and the only time material to it.

13 United States Court of Claims.

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And now, this 29th day of January, 1875, the petitioner, by his undersigned counsel, submits this written request to this court to find specifically as to the following matters of fact, deemed material to the judgment in this case:

I. That Jean B. Castille, on March 20, 1866, before Jno. F. Smith, justice of the peace, parish of St. Landry, Louisiana, made oath that he is a planter in the above State and parish, and loyal to the Government of the United States; that he sold to A. Desmare, for value received, on or about October 20, 1862, thirty-seven bales cotton, bearing no mark, weighing 15,540 lbs., with the condition that said cotton should remain on his plantation, subject to the order of A. Desmare, until such
14 time as he might be able to ship it to New Orleans; and further, that on or about April 24, 1863, the aforesaid cotton was taken from his plantation by the provost-marshal, who acted under the orders of Major-General N. P. Banks; that said cotton was taken to Bare's Landing, and there delivered to the post quartermaster, who shipped the same to New Orleans in Government transports; and that Mr. A. Desmare, a loyal citizen, and a resident of the city of New Orleans, was the bona-fide owner of said cotton; and that in this connexion Jean B. Castille was dead on November 7th, 1872.

II. That Francois Marks, on May 16, 1866, before John F. Smith, justice of the peace, parish St. Landry, La., made oath that he is a planter in the above State and parish, and loyal to the Government of the United States; that he sold, for value received, on October 21, 1862, to Mr. A. Desmare, thirty bales of cotton, bearing no mark, and weighing 14,398 pounds, with the condition that said cotton should remain on his planta-
15 tion, subject to the orders of A. Desmare, until such time as he might be able to ship it to New Orleans. And, further, that on or about the day of April, 1863, the aforesaid cotton was taken from his plantation by the provost-marshal, who acted under the orders of Major-General N. P. Banks; that said cotton was taken to Bare's Landing and there delivered to the post quartermaster, who shipped the same to New Orleans in Government transports. And, farther, that Mr. A. Desmare, a loyal citizen, and resident of the city of New Orleans, was the bona-fide owner of said cotton. And in this connexion that Francois Marks was dead on November 7, 1872.

III. That Simon Marks, on March 20, 1866, before John F. Smith, justice of the peace, parish St. Landry, La., made oath that he is a planter in the above parish and State, and loyal to the Government of the United States; that he sold, for value received, on October 23, 1862, to A. Desmare, ninety-eight bales of cotton, bearing no mark, and
16 weighing together 42,140 lbs., with the condition that said cotton should remain on his plantation, subject to the orders of A. Desmare, until such time as he might be able to ship to New Orleans. And, further, that on or about the day of April, 1863, the aforesaid cotton was taken from his plantation by the provost-marshal, who acted under orders from Maj. Genl. N. P. Banks; that the said cotton was taken to Bare's Landing, and there delivered to the post quartermaster, who shipped the same to New Orleans in Government transports. Further, that A. Desmare, a loyal citizen, and resident of New Orleans, was the bona-fide owner of the said cotton. And, in this connexion, that Simon Marks was dead on November 7, 1872.

IV. That none of the cottons embraced in the findings of the court in paragraph 2 are contained in the above I, II, III sections.

V. That Alphonse Desmare took the oath of allegiance to the United States January 19, 1866, in the city of New Orleans, to wit:

17 "I, Alphonse Desmare, of the city of New Orleans, State of Louisiana, do solemnly swear, in the presence of Almighty God, that I will henceforth faithfully support, protect, and defend the Consti-

tution of the United States, and the Union of the States thereunder; and that I will in like manner abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed or modified, or held void by Congress, or by decree of the Supreme Court; and that I will in like manner abide by and faithfully support all proclamations of the President made during the existing rebellion having reference to slaves, so long and so far as not modified or declared void by the Supreme Court: So help me God.

"A. DESMARE.

"Sworn to and subscribed before me, a justice of the peace for the city of New Orleans, State of Louisiana, this nineteenth day of January, 1866.

[SEAL.] "SAM'L MYERS,

"*Second Justice of the Peace, Parish of Orleans.*"

18 VI. From the facts set forth in the affidavits of John B. Castille, François Marks, and Simon Marks, we ask your honors to find that claimant was, at the time these proceedings were instituted, the owner of one hundred and sixty-five bales cotton which were taken from the plantations of the said Castille, François Marks, and Simon Marks, by capture by the U. S. forces in April, 1863, and that the proceeds thereof are now in the Treasury of the United States.

VII. We ask your honors to state from the proofs that claimant was the owner of certain cottons set forth in his claim, say four hundred and ninety-two bales. If this cannot be done, we ask you to set forth the number of bales you find proved to be owned by A. Desmare.

VIII. If your honors grant the requests written in I, II, III, and VI, we then ask for the similar findings in the case of seventeen bales bought of Adam Fate and set forth in Louis Anhille's affidavit.

19 Respectfully submitted.

DURANT AND HORNOR,
*Attorneys for Claimant.*

Filed Jan'y 29, 1875.

Upon the foregoing request, by the claimant's attorneys for additional findings of fact, the court made the following order, to wit:

Since the filing of the facts found by the court in this case, the claimant has filed a request for six additional findings.

The court refuses to allow the first, second, and third, because the making of ex-parte affidavits by J. B. Castille, François Marks, and Simon Marks, and the contents of the same and the death of those persons are not such facts in this case as, by the rules of the Supreme Court, this court is required to find.

The fourth and fifth are allowed, with the addition of a copy of the oath referred to in the fifth.

The sixth is not allowed, because the ownership and seizure of the cotton therein mentioned are not proven.

20 The seventh is not allowed, because, in the finding by the court heretofore filed, all the cotton seized by the defendant's agents, which the claimant proved to be owned by him, is specifically stated.

The eighth is not allowed because the first, second, and third being refused, the eighth is refused for like reason.

By the court.

21 United States Court of Claims.

ALPHONSE DESMARE
*vs.*
THE UNITED STATES. } No. 2802.

And now, this March 26, 1875, into this hon. court comes the petitioner, Alphonse Desmare, by his undersigned counsel, and admits that he has notice of a change in item No. 1, of the original findings of facts made by the court in this case.

Averring that he made no objection to the original finding No. 1, now changed, and reserving all special legal exceptions thereto, as well as the general objection to the illegality of all negative findings of fact, and also the right to make hereafter all points involved in the said change, if prejudicial to his interests and connected with the findings of facts, petitioner, in addition to the items of fact heretofore requested to be found by the court in the submission filed January 29, 1875,
22 and in ignorance of any action as yet had thereon, and without prejudice to his rights, asks the court to find the following matters of fact deemed material to the judgment in this case, and directly connected with item No. 1, as changed by the court:

First. That from April 1st, 1862, to January 19, 1866, there is no proof of the existence of the partnership of Laforest and Desmare; or that they ever received a bale of cotton in New Orleans; or that they ever bought or sold a bale for their own account; or that a bale of cotton was ever consigned to them for sale on commission, or in any other way.

Second. There is no proof that Alphonse Desmare bought a bale of cotton from April 27, 1862, to Jan'y 19, 1866, for the account of Laforest and Desmare, commission-merchants, or for the so-called Confederate States.

23 Third. There is no proof that Alphonse Desmare, from April 27, 1862, and prior thereto, down to January 19, 1866, when he renewed his allegiance, was ever out of a rebel State or out of an insurrectionary district, or that he ever was, during that period, in any loyal State of this Union.

Fourth. During the war the parish of St. Landy was under the complete control of the rebels, except from April 20, 1863, to May 21, 1863, when Military-Governor Chickering, then in command, abandoned the post and parish, and moved his train and troops to Berwick.

Respectfully submitted.

DURANT AND HORNOR,
*Attorneys for Alphonse Desmare, Claimant and Petitioner.*

Filed March 27, 1875.

Upon the foregoing request by the claimant's attorneys for additional findings of fact, the court made the following order, to wit:

After filing in the clerk's office, for examination by the parties, the findings of fact, and before the same were entered of record in
24 court, the court, on reconsideration, withdrew the first finding, and substituted that which, with the second, third, and fourth, is now entered of record.

The claimant has since (on the 27th of March) filed a request for four additional findings, in relation to which the court decides as follows:

To the first and second, the court says that all the proof in the case as to the partnership of Laforest and Desmare is set forth in the findings.

To the third, the court says that the only proof as to where the claimant was, during the time therein mentioned, is set forth in said findings.

The fourth the court declines to allow in the terms set forth, because not warranted by the evidence.

By the court.

MARCH 29, 1875.

25 In the Court of Claims.

ALPHONSE DESMARE
*vs.*
THE UNITED STATES. } No. 2802.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitors for the claimant for the allowance of an appeal, as filed in the clerk's office May 17, 1875, and of the order of the court of May 17, 1875, allowing the same; of the findings of fact by the court, and the conclusions of law thereon; of the opinion of the court, and the dissenting opinion of Judge Loring; of the requests of claimant's counsel for additional findings of fact, and of the orders of the court thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 27th day of May, A. D. 1875.

[SEAL.] JOHN RANDOLPH,
*Asst. Clerk Court of Claims.*

(Indorsement on cover:) No. 304. Alphonse Desmare, appellant, vs. The United States Court of Claims. Filed 28th May, 1875.

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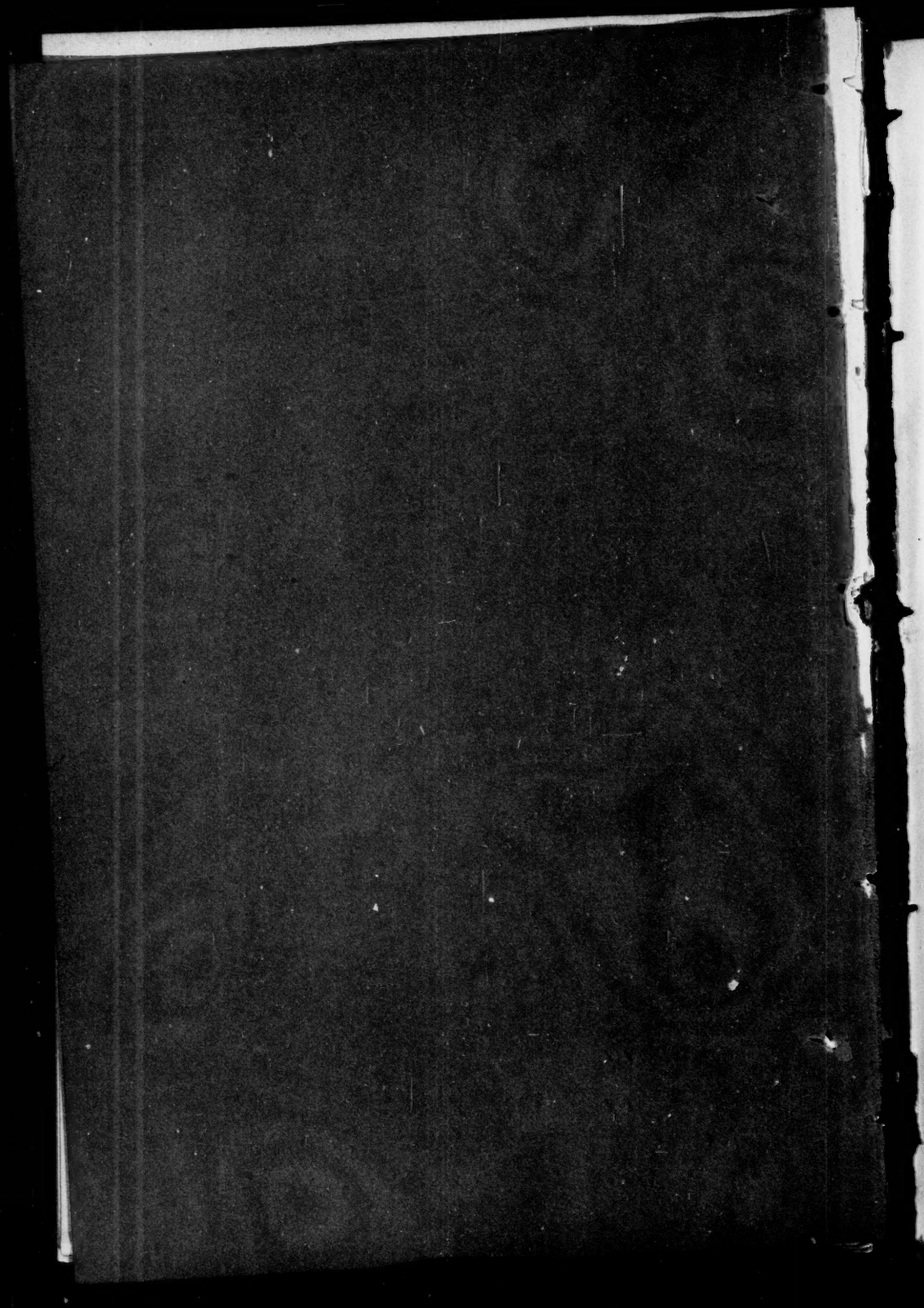

# Supreme Court of the United States.

October Term, 1876.

ALPHONSE DESMARE
*vs.*
THE UNITED STATES.

*No.* 304.

Appeal from the Court of Claims.

BRIEF FOR PLAINTIFF AND APPELLANT.

Under the captured and abandoned property acts (12 S. L., 820, 13 S. L., 375) the plaintiff's petition was filed herein, claiming the proceeds of 556 bales of cotton, May 2, 1867, in the Court of Claims.

The first appearance in the case of the undersigned counsel was in the month of March, 1873, nearly six years afterwards; and it gave rise to the proceedings in this court, under No. 4 original, October term, 1873, reported in 9 Court of Claims Rep., p. 1., a rule *nisi* for a mandamus, which was denied. The case in the lower court was subsequently tried, and submitted on the merits January 18, 1875. On April 5, 1875, judgment was rendered, dismissing the petition; and consequently the question presented in the mandamus case does not now come up for review. After an ineffectual motion for a new trial,

the plaintiff has taken the present appeal. The opinion of the lower court is reported 10 Court of Claims Rep., 385, in full.

ASSIGNMENT OF ERRORS.

1st. The lower court erred in assuming as a legal presumption that the domicil of plaintiff was in Federal territory, that is, in the city of New Orleans, at the time when, within the Confederate territory, he purchased the cotton, whose proceeds are claimed in this suit.

2d. And in drawing from this mistaken conception of legal presumption of domicil the erroneous inference that the plaintiff left the Federal territory, that is, New Orleans, and crossed into Confederate territory for the purpose of trading with the public enemy of the United States by purchasing the cotton, whose proceeds are claimed in this suit.

3d. And in adjudging that the purchases made by petitioner were absolutely null and void, and that he acquired no title to the cotton in question because the court erroneously held him to be a resident of Federal territory at the time of his purchase, and that he had crossed the lines of military occupation to trade with the enemies of the United States.

4th. And in dismissing the plaintiff's petition.

5th. And in not decreeing in favor of the plaintiff for the full amount of the proceeds of plaintiff's cotton now in the Treasury of the United States.

ARGUMENT.

The requirements of the captured and abandoned property laws imposed on every petitioner to enable him to recover

are to prove: *First*, his ownership; *second*, the capture by the United States; *third*, proceeds in the Treasury. The proofs being satisfactory on these three points the plaintiff was entitled to a recovery. But the only court that could give relief was the United States Court of Claims.

Mrs. Alexander's Cotton, 2 Wall., 404.

We do not understand that the principles of law applied by the court in that case have ever been brought into serious doubt in the many subsequent decisions involving these confiscation acts. These principles are: FIRST. In time of war, either belligerent has the right to make captures on land of any property, real or personal, and confiscate the same; SECOND. That the court cannot inquire into the personal character and disposition of individual inhabitants of enemy's territory, for this is a *political* question; THIRD. Hence, all the people of each State or district in insurrection against the United States must be regarded as enemies *until that relation is thoroughly and permanently changed.* This decision at once arrested very many cases pending in the United States circuit court by individual owners and claimants against the special agents of the Treasury Department, who had to sustain, whilst carrying out the law, the burden of very heavy suits for damages against them. One of these suits, a type of the rest, may be seen in Flanders *vs.* Tweed, 9 Wall., 425; also Lamar *vs.* Brown, April 17, 1876.

In the present case the proofs of ownership, capture, and proceeds in Treasury were all complete and satisfactory. But to overcome this *prima facie* case the court held that, as to the United States, the ownership of Desmare, acquired by purchase within the rebel lines, was *void.*

The principles of law, the facts being found by the court,

upon which this result was reached are laid down in the report in 10 Court of Claims Rep., 387.

Presumptions are consequences which the law or the judge draws from a known fact to a fact unknown. The first are established by law; the latter are left to the judgment and discretion of the judge, who ought to admit none but grave, precise, and *concordant* presumptions. In the present case the lower court says that the claimant's domicil, found "to have been in the city of New Orleans before "the war, and not proved to have been changed, is pre- "sumed to have continued and been in that city when the "purchases of cotton were made by him within the rebel "lines," &c.

But this presumption is neither grave, precise, nor concordant, and must be rejected. It is contrary to the facts found, and is contrary to law. It is forced and unnatural.

The contradictory of the proposition is true in law and fact. Desmare, the petitioner, had his domicil in the parish of St. Landry when he bought the cotton there.

It being established that before the war *Desmare* was a rebel, and a rebel still on January 19, 1866, it is a presumption of law that during all the intermediate time he was a rebel.

*Probatis extremis præsumuntur media.* Domicil is a question both of law and fact. *Desmare* was, in October, 1862, in the parish of St. Landry, "purchasing cotton and "acting as agent of the rebel government." As such an officer, it is undeniable, he could have no domicil within the Union lines. "The voluntary residence of the peti- "tioner in New Orleans after the war began would have "been a crime, and statute evidence of it."

See Loring, J's, dissent in this case.

The moment *Desmare* took the oath and assumed the

duties of an agent of the Confederate government in St. Landry, his domicil, both political and civil, in that parish, became fixed *eo instanti.*

This is a *presumptio juris et de jure.* It is as conclusive as the bar of a statute of limitation, (*prescription,*) or the estoppel by an adjudication of a matter in a court of competent jurisdiction, (*res judicata.*) No court will allow the contrary proof to be made. In the case of a public officer, neither the fact nor the intent of a domicil elsewhere could prevail over this presumption, which differs radically from the presumptions invoked against us in the opinion of the court below.

1 Evans' Pothier, p. 414.
Louisiana Code, 1870, Art. 45.
Phillimore on Domicil, page 61.
Murray *vs.* The Charming Betsy, 2 Cranch, 64.
The Venus, 8 Cranch, 280, *et seq.*
The Frances, 8 Cranch, 363.
Merlin Rep., *verbo* domicile.
Boileux Commentaries, Code Nap., vol. 1, p. 220, on Code Nap., article 107.

"It cannot be doubted that there are transactions so "radically and fundamentally *national* as to impress the "national character, independent of peace or war, and the "local residence of the parties."

The Vrow Anna Catharina, 5 C. Rob., * 167.

Sir William Scott gives many examples of this doctrine, but none so unequivocal as that which the facts of this case present.

We have shown that the petitioner was involved in the

universal disloyalty of the South from the beginning of the war up to 19th January, 1866, and had his domicil, political and civil, in rebel territory during all that time, except for the interval between April 27, 1862, and October, 1862. In the absence of any proof of the fact that *Desmare* was domiciled in New Orleans during this period, the lower court presumes, because he was *there* domiciled before the war; and because this domicil was not proved to have been changed, it must be presumed to have continued; and hence *Alphonse Desmare* was domiciled in New Orleans when the purchases were made by him within the rebel lines.

We understand this presumption, which the lower court applies to claimant's domicil, to be applicable to ordinary times and not to the exceptional state of war. In a prize court it cannot be doubted that in an investigation into the legality or illegality of a trade carried on in an alleged violation of the laws of war, and where the proceedings were *in rem* against cotton, as in this case, *Desmare's* domicil would be found to be in rebeldom, and not under the flag of the Union. Politically, he would be decreed a Confederate by the courts of the Confederate States; and the idea that the Confederacy could have confiscated this cotton before its capture by the United States forces because *Desmare* was *presumably* a loyal man because he had crossed the lines from New Orleans, and because he had renewed his allegiance to the Union, is purely illusory. And yet this result flows as naturally from the facts found as the legal conclusions drawn by the court below; and both are contradictory and untrue.

We understand that the question is what is the *political* rather than what is the *civil* domicil of *Desmare* when residing in St. Landry parish. It seems to our minds that the simple test, did *Desmare* abandon the Union and cast

his lot with the rebels, if applied in this case would be quite conclusive. His acts and doings manifest a clear intent in him *quatenus in illo exuere patriam.*

Whicker *vs.* Hume, 7 H. L. C., 159.
Moorhouse *vs.* Lord, 10 H. L. C., 282.
Holdane *vs.* Eckford, L. R., 8 Eq., 631.
Woolsey's Intern. Law, § 168.

"For the purpose of capture, property found in enemy "territory is enemy property without regard to the status "of the owner. *In war, all residents of enemy country* "*are enemies.*" The *time* is not *so essential* as the *intent.*

Lamar *vs.* Brown, 4, 17—'76, U. S. S. C.
Scholefield *vs.* Eichelberger, 7 Peters, 593.
Johnson *vs.* Merchandise, 6 Hall's Am. L. I., 68.
United States *vs.* Penelope, 2 Peters' Adm'y Dec., 438.

The Court of Claims first presumes that New Orleans being *Desmare's* domicil prior to its capture, *Desmare* remained so domiciled afterwards; and from this presumption draws a consequent presumption that *Desmare* must have *crossed the line* to buy the cotton.

But no presumption can be safely drawn from a presumption.

Douglass *vs.* Mitchell's Ex'r, 35 Penn., 440.

War made all the inhabitants of Louisiana enemies of the Union. To this rule there were no exceptions in law, and very few, indeed, in fact. As fast as the territory was reconquered the inhabitants of this reconquered portion did not legally become loyal and friends of the Union, and vested with the capacity to stand in

universal disloyalty of the South from the beginning of the war up to 19th January, 1866, and had his domicil, political and civil, in rebel territory during all that time, except for the interval between April 27, 1862, and October, 1862. In the absence of any proof of the fact that *Desmare* was domiciled in New Orleans during this period, the lower court presumes, because he was *there* domiciled before the war; and because this domicil was not proved to have been changed, it must be presumed to have continued; and hence *Alphonse Desmare* was domiciled in New Orleans when the purchases were made by him within the rebel lines.

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But no presumption can be safely drawn from a presumption.

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judgment in the Court of Claims or any other National court. Until pardoned and their allegiance renewed they were enemies. Generally they could not sustain *personam standi in judicio* until "within two years after the "suppression of the rebellion," *i. e.*, within two years from August 20, 1866, although in special cases Executive pardon and amnesty might have conferred the ability to sue at a somewhat earlier period. Now the essential elements of illegal traffic in time of war are: 1st. That it takes place between "members of the two nations respect-"ively in hostility to each other." 2d. And that it counteracts the operations of war. (1 Kent, 66.) Both of these elements must concur.

In Griswold *vs.* Waddington, (15 Johns., 57,) the dealing was between an American citizen and a British subject.

In United States *vs.* Grossmayer, (9 Wallace, 72,) the dealing was between a citizen of New York and a citizen of Georgia.

Montgomery *vs.* United States (15 Wall., 395,) the dealing was between a neutral British subject domiciled in New Orleans within the Union lines, and a rebel and his property, both within the Confederate lines.

See also Coppell *vs.* Hall, 7 Wall., 542.

United States *vs.* Lapène & Ferré (17 Wall., 601) was between loyal citizens and a rebel.

Mitchell *vs.* United States, (21 Wall., 350,) the dealing was between a loyal citizen of Kentucky and a rebel in disloyal territory.

An examination of all the cases will show that the parties claiming had in view the introduction of the rebel property into and within the lines of the Union army, while in *Desmare's* case neither such a fact nor such an

intent is found by the lower court, and, indeed, cannot be reasonably ascribed to him.

Besides, in Anderson's case, (9 Wall., 56;) Carlisle's case, (16 Wall., 147,) and in this case, the purchases must have been made in rebel notes. This is expressly found as a fact in the present case; whilst in Coppell's, Mitchell's, and Montgomery's cases the payment of the price was made either in legal-tenders or in coin or its equivalent; certainly not in rebel notes. The latter cases aided the Confederacy directly; the former not in the least.

The facts found are that *Desmare* bought the cotton within the parish of St. Landry, La. Had this property remained in the ownership of the planters there, it would unquestionably have been condemned by a prize court as enemy's property, no matter what might have been the national character and personal domicil of the owners.

30 Hhds. Sugar *vs.* Boyle, 9 Cranch, 191.
Prize Cases, 2 Black, 635.

*Desmare* had the right, being a rebel and in hostile territory, to buy from other rebels any kind of property, movable or immovable, there situated, specially including cotton.

Anderson's Case, 9 Wallace, 56.

If this be denied, and it should be asserted that such purchases and sales were void because so pronounced by the act of Congress of July 17, 1862, and the opinion in McKee *vs.* United States, (8 Wall., 167,) or for any other reason, we reply by referring to page 72 of 9 Wallace, showing this argument to be untenable.

*Desmare* bought and paid for the cotton. The contracts, except in one instance, were *executed* at once. Notes were

given for the cost of 84 bales, which were not paid for until "after the war." On these notes, had *Desmare* not paid them, the holder might have sued after the close of the war and recovered in the United States courts.

Thorington *vs.* Smith, 8 Wallace, 1.
Railroad *vs.* King, 10–25, '75, Field, J., U. S. S. C.

Indeed, unless it be found as a fact by the court that *Desmare* was a good loyal citizen of the United States from the beginning of the war to the renewal of his allegiance, the case of

Carlisle *vs.* United States, 16 Wallace, 147,

will entirely cover this. A neutral, manufacturing and selling saltpetre for war purposes for the Confederacy, buys cotton from the producer, which remains on the plantation in Georgia. The property was captured, and the neutral sued for the proceeds, which were awarded to him, although he was *found* to have given *comfort and aid to the rebellion.*

The court will, if needful, take judicial cognizance of the fact that the Union troops were in possession but a very few days of the parish of St. Landry, Louisiana, and that the territory reverted to the rule of the rebels almost at once, and thus remained till the close of the war.

It cannot be denied, as a general proposition, that all trading with an enemy is illegal. We have endeavored to show how completely the present case is wanting in the essentials of any such traffic, either on land or water. But, for the sake of argument only, let us admit that *Desmare* was a loyal citizen of New Orleans, departing thence, after its capture by the United States, and going to rebeldom to buy cotton in order to introduce it within the lines of the

Federal army in Louisiana. This would undoubtedly be to give aid and comfort to the rebellion; the transaction would be violative of the President's proclamation and the acts of Congress before alluded to, and would bring the transgressor under the operation not only of the laws of nations, or public law, as it is called, but likewise of the criminal law of the United States. Nor need we determine the *vexata questio* whether carrying corn to an enemy in time of war be, under the common law, *malum in se* or only *malum prohibitum*, because, in every event, the alleged violations of law on *Desmare's* part, whatever and wherever they may have been, are covered and effectually blotted out by the pardon and amnesty of the President.

Gist *vs.* Mason, 1 Term Rep., 84, Mansfield.
Potts *vs.* Bell, 8 Term Rep., 548, Kenyon.
The Hoop, 1 C. Rob., 196, Scott.

We pray your Honors to reverse the judgment of the court below, and to direct that court to enter judgment in favor of the claimant for the amount of the net proceeds of his cotton paid into the United States Treasury, with all farther, general, and equitable relief.

Respectfully submitted.

DURANT & HORNOR,
*Attorneys for Claimant and Appellant.*

WASHINGTON, D. C., *September* 15, 1876.

IN THE HONORABLE

# The Supreme Court of the United States.

*October Term*, 1876.

ALPHONSE DESMARE
*vs.*
THE UNITED STATES.

*No.* 304.

*Reply of Counsel of Appellant to the Argument on behalf of the United States of Mr. Solicitor-General.*

The claimant and appellant was an inhabitant of the city of New Orleans, in the State of Louisiana, "where he resided before the war," as stated in the finding of facts, (Rec., p. 3, fol. 7;) and there is not "any evidence in the Record as to where the claimant was on the 27th April, 1862, when the United States military forces took possession of New Orleans, or before that date during the war," as appears by the finding of facts.

See Rec., p. 4, fol. 7, near the top.

If the claimant had been an inhabitant of Louisiana at the commencement of hostilities—that is, when the proclamation of the President declared the blockade of the ports of several States, including those of Louisiana, on the 19th of April, 1861, (see *The Protector*, 13 Wallace, p.

702)—then the claimant had legally impressed upon him the character of an enemy of the United States. At that date, and for some time after, "the States of Louisiana and "Mississippi were wholly under rebel dominion, and all the "people of each State were enemies of the United States. "The rule which declares that war makes all the citizens "or subjects of one belligerent enemies of the Govern- "ment, and of all the citizens or subjects of the other, ap- "plies equally to civil and to international wars."

See *The Venice*, 2 Wallace, p. 274.

There is no proof in the record that claimant was in New Orleans when that city was taken possession of by the United States military forces on the 27th April, 1862. (See finding of facts, Rec., p. 4, fol. 7, top.) If he had then been in New Orleans, his character as an enemy of the United States, legally impressed upon him, as we have seen, would not have been changed; he would still have remained an enemy.

The proclamation of Major-General Butler on taking possession of New Orleans, issued on the 6th of May, 1862,—(see *The Venice*, 2 Wallace, p. 276,)—recognized this *status* of the inhabitants, when, among other things, it said:

"All persons well disposed towards the Government of "the United States, who shall renew their oath of allegi- "ance, will receive the safeguard and protection, in their "person and property, of the armies of the United States, "the violation of which by any person is punishable with "death."

And when the next paragraph of the proclamation said:

"All persons still holding allegiance to the Confederate "States will be deemed rebels against the Government of

" the United States, and regarded and treated as enemies " thereof."

See Parton's *General Butler in New Orleans*, p. 293. (New York: 15th edition. 1864.)

This is perfectly clear. All persons, native or naturalized citizens of the United States, inhabitants of New Orleans, who did not renew their allegiance by oath, were considered as retaining the character of enemies of the United States, legally impressed upon them; therefore, if claimant had then been in the city he would have been there as an enemy of the United States, since he did not renew his allegiance to our Government until the 19th of January, 1866.

See finding of facts, Rec., p. 10, foot.

A second proclamation from the same commanding general appeared on the 13th September, 1862, which said:

" As in the course of ten days it may become necessary " to distinguish the disloyal from the loyal citizens and " honest neutral foreigners residing in this department," neutrals were ordered to present themselves to be registered by the provost-marshals.

See Parton's *General Butler in New Orleans*, p. 469.

A third proclamation from the same commanding general was issued on the 24th September, 1862, which said:

" All persons, male or female, within this department, " of the age of eighteen years and upwards, who have ever " been citizens of the United States, and have not renewed " their allegiance before this date to the United States, or " who now hold or pretend any allegiance or sympathy " with the so-called Confederate States, are ordered to re-

" port themselves on or before the first day of October " next to the nearest provost-marshal, with a descriptive " list of all their property and rights of property, both " real, personal, and mixed, made out and signed by themselves, respectively, with the same particularity as for " taxation. They shall also report their place of residence " by number, street, or other proper description, and their " occupation, which registry shall be signed by themselves, " and each shall receive a certificate from the marshal of " registration as claiming to be an enemy of the United " States.

" Any person, of those described in this order, neglecting so to register themselves, shall be subject to fine or " imprisonment at hard labor, or both, and all his or her " property confiscated by order, as punishment for such neglect.

" On the first day of October next, every householder " shall return, to the provost-marshal nearest him, a list of " each inmate of his or her house, of the age of eighteen " years or upwards, which list shall contain the following " particulars: the name, sex, age, and occupation of each " inmate, whether a registered alien, one who has taken the " oath of allegiance to the United States, a registered enemy " of the United States, or one who has neglected to register " himself or herself either as an alien, a loyal citizen, or a " registered enemy. All householders neglecting to make " such returns, or making a false return, shall be punished " by fine or imprisonment with hard labor, or both.

" Each policeman will, within his beat, be held responsible that every householder failing to make such return, " within three days from the first of October, is reported to " the provost-marshal; and five dollars for such neglect, for " every day in which it is not reported, will be deducted " from such policeman's pay, and he shall be dismissed.

" And a like sum for conviction of any householder not
" making his or her return shall be paid to the policeman
" reporting such householder.

" Every person who shall, in good faith, renew his or
" her allegiance to the United States previous to the first
" day of October next, and shall remain truly loyal, will
" be recommended to the President for pardon for his or
" her previous offences.

" By order of

" MAJOR-GENERAL BUTLER.

" GEO. C. STRONG, A. A G.,
" *Chief of Staff.*"

See Parton's *Butler in New Orleans*, as above, p. 473.

These proclamations, which the court will notice as a part of the history of the country, show unmistakably that the distinction between the loyal citizen and the enemy of the United States in New Orleans was constantly recognized and acted upon. The last proclamation cited is formally addressed to such persons as hold allegiance to the Confederate States. They are ordered to report themselves, with a list of their property, to the provost-marshal, and are told that " each shall receive a certificate " from the marshal of registration as claiming to be an " enemy of the United States."

See the case of Lasere *vs.* Rochereau, 17 Wallace, p. 437.

As is stated in the finding of facts, there is no proof in the record of the whereabouts of claimant at the time of these proclamations; but whether he was in New Orleans and within the lines of Federal military occupation, or out of the city and within the Confederate lines, he was equally

regarded as an enemy of the United States, because proclaimed such by law and recognized as such by military authority, then paramount.

The *status* of claimant having been thus fixed as an enemy of the United States, it is a presumption of law that he continued such until he is shown to have changed, that is, when he availed himself of the President's proclamation of pardon and amnesty, and took the oath of allegiance to the United States; in other words, he was and remained a public enemy from the commencement of hostilities on the 19th of April, 1861, until the date of his oath, 19th of January, 1866.

Where was the claimant between these two dates? The conclusions of law in the court below declare that as the claimant's domicil was in New Orleans before the war, that is, before the 19th April, 1861, it must be presumed in law to have continued and been in that city when the purchases of cotton were made by him within the rebel lines. This purchase of cotton by the claimant is found as a fact by the court below to have been made by the claimant in the parish of St. Landry, Louisiana, in October, 1862.

And the court below, as a further presumption of law, declares that claimant's domicil having been in New Orleans previous to 19th April, 1861, he is presumed to have been personally present in New Orleans when the city was captured, April 27, 1862.

Is this a legal presumption or not? "Presumptions of "law are suppositions or opinions previously formed on "questions of frequent occurrence—being found from ex- "perience to be generally accordant with truth—and re- "main of force until repelled by contrary evidence."

Matthews on Presumptive Evidence, p. 1.

Professor Greenleaf says, (Evidence, vol. 1, § 41,) after treating of various kinds of legal presumptions: "Other "presumptions are founded on the experienced *continu-* "*ance* or permanency, of longer or shorter duration, in "human affairs. When, therefore, the existence of a per- "son, a personal relation, or a state of things is once estab- "lished by proof, the law presumes that the person, rela- "tion, or state of things continues to exist as before, until "the contrary is proved, or until a different presumption is "raised from the nature of the subject in question."

In applying these principles, the court below, starting from the fact that claimant's domicil was in New Orleans before the war, that is, before 19th April, 1861, presumes that it continued to be there, but errs in confounding domicil with residence. It does not legally or rationally follow that because claimant's domicil was in New Orleans before April 19, 1861, that he was actually living in that city on the 27th April, 1862, or at any other time, and least of all can such a presumption prevail in time of war. Thousands of men who had their domicil in New Orleans before 19th April, 1861, left the city soon after in the military and civil service of the Confederate States. It is very possible that claimant was among them.

It is found as a fact that claimant was "in October, "1862, in the parish of St. Landry, acting as an agent of "the rebel government for the exchange of Confederate "bonds for Confederate notes, for which purpose he had "an office at Opelousas, in said parish, and said parish was "within the rebel lines until April, 1863."

See Rec., p. 4, top.

These facts describe a man long settled, not a fugitive and a new comer. He has an office, that is, a house where

he transacts his business; he is an officer of the Confederate government, in one of the most responsible and important positions, in charge of their bonds and money, and engaged in a service most essential to their fortunes; all these dispel the supposition that he had just run away from New Orleans—run away, we remark, because an enemy of the United States, if in that city, he was under the eye of the military, martial law prevailing, when no one, friend or enemy, can move beyond the lines without a military passport.

We may state here, parenthetically, that Mr. Solicitor-General has fallen into an error in his brief (page one, end of second paragraph) in saying that claimant was "agent for the Confederate government in the purchase "of cotton." The finding of fact is as we have stated it; claimant "was agent of the rebel government for the ex-"change of Confederate bonds for Confederate notes."

The court below, from the fact that claimant had his domicil in New Orleans before April, 1861, not only infers as a legal conclusion that he was in the city all the time up to October, 1862, but further, that he "crossed "the Federal lines about the time he is proved to be in "the parish of St. Landry," which was in October, 1862.

This is a most strained and unnatural, and therefore not a legal presumption; to realize its truth you must suppose that he was in New Orleans, which is not proved, in October; that in that month he crossed the Federal lines, which is not proved, and that at once he receives one of the most important appointments, opens an office, and is in the full tide of business. These are not legal presumptions, but purely imaginary hypotheses, without any foundation in fact. They are out of the usual course of things, and it is not possible to believe them to be true.

When we find that claimant has an office of trust in St.

Landry in October, 1862, if we are to raise any presumption upon the fact, it is rather that he had been a long than a short time there in the rebel service, and the *legal* presumption is just as strong that he had been there from the time of the commencement of the war as from any other date.

This case differs completely from that of Montgomery *vs.* United States, (15 Wallace, p. 305.) There, Burbrige, a commission merchant in New Orleans, then in possession of the United States, as factor and agent of an enemy residing within the Confederate lines, undertook to sell certain produce then on the plantation where the enemy resided, to a neutral residing in New Orleans. This was nothing more nor less than commercial intercourse between the rebel in the Confederacy and the neutral in New Orleans, and was unlawful.

It differs, also, from the case of United States *vs.* Lapene, (17 Wallace, p. 601.) In that case, Lapene, while the whole of Louisiana was under Confederate rule, in February, 1862, Lapene living in New Orleans, sent an agent into the country parishes to purchase produce, and in March sent him money to carry on his agency. After the capture of the city by the military forces of the United States, the agent made purchases of produce within the Confederate lines. These purchases were treated by the court as the act of Lapene, and held to be commercial intercourse with the enemy and unlawful; but the court were not unanimous.

The claimant's case differs also very materially from that of Mitchell *vs.* the United States, (21 Wallace, p. 350.) In that case, Mitchell, a resident of a loyal State, Kentucky, never declared in insurrection, left Louisville under a military passport shortly after the commencement of the war, went into the Confederate lines, and bought a large quan-

tity of cotton, collected debts, and transacted business, returning to Louisville just before the close of the war; it was held that his dealings were commercial intercourse with the public enemy, and illegal. On the other hand, the claimant here was not a loyal citizen; he was legally proclaimed to be an enemy of the United States; he was an officer of the Confederate government, and had all the *indicia* of a rebel resident in rebel territory; and during the continuance of hostilities his commercial intercourse with rebels was not contrary to the laws of war—was not a dealing between a loyal citizen and an enemy. The act of a citizen of New York, such as Mansfield Lovell, for instance, entering the service of the Confederate States, was clearly operative of a change of domicil, and how much stronger was the case of a citizen of a disloyal State in taking such service. Had Mitchell, in 21st Wallace, after leaving Kentucky and entering the Confederate lines, actually taken service under the rebel government, surely the judgment of the court would have been different; it would not then have been possible to consider his purchases in any other light than a trading between two enemies of the United States, which is a matter not any more illegal than similar intercourse between two loyal citizens. So in the case of this claimant, he was legally an enemy from the beginning; he was in the enemy's service as an officer of his government, and while such made the purchase of the cotton in question; he was an enemy dealing with enemies, and there was no violation of the laws of war from our stand-point.

Mr. Solicitor-General, in his brief, pp. 3 and 4, still insisting that claimant was in New Orleans in September or October, 1862, just previous to the time when it is found as a fact he was in the parish of St. Landry, insists that he had no right to go out of New Orleans, because he says

the better opinion is that a citizen cannot emigrate without the consent of his country.

This, however, is not the law of the United States. The act of 27th July, 1868, (15 Stat. at Large, p. 223, embodied in U. S. Rev. Stat., sec. 1999,) declares in favor of the right, and says that "any declaration, instruction, opinion, order, "or decision of any officer of the United States which de- "nies, restricts, impairs, or questions the right of expatri- "ation, is declared inconsistent with the fundamental prin- "ciples of the Republic."

The view there taken by Mr. Solicitor-General cannot be entertained of claimant's departure from New Orleans so far as the same may be an act of expatriation or analogous thereto. But there is no proof that claimant was in New Orleans. His domicil was there before the war broke out, and if you choose to consider as a legal presumption that his domicil continued to be in that city, it does not follow that he was present there any more than it followed that Mitchell, in 21 Wallace, was in Louisville, because his domicil was there; and the presumption of continued domicil even is gone so soon as we find him in the employment of the government of the enemy.

Mr. Solicitor-General, still insisting, without proof, that claimant was living in New Orleans after the Federal occupation, says that his going out to join the enemy was a crime, of which he cannot now take advantage to obtain a profit for himself. If he had been in New Orleans, the commander of the department, as we have shown by the proclamation, recognized him as an enemy, and by the laws of war to be an enemy is no crime, nor has our Government attempted anywhere to treat it as such; hence claimant's going out of the city—if he did, which we deny —to join his friends and our enemies, was no crime at all; and if it were, it has been blotted out by the pardon and

amnesty granted by the clemency of the national Executive.

This case was decided below by a divided court. Judge Peck was prevented by sickness from sitting in the cause, and Judge Loring dissented; and to the opinion of the latter we respectfully invite the attention of this Honorable Court.

See 10 Court of Claims, p. 394.

Submitted with proper respect.

DURANT & HORNOR,
*For Desmare.*

4TH DECEMBER, 1876.

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OCTOBER TERM, 1876.

ALPHONSE DESMARES
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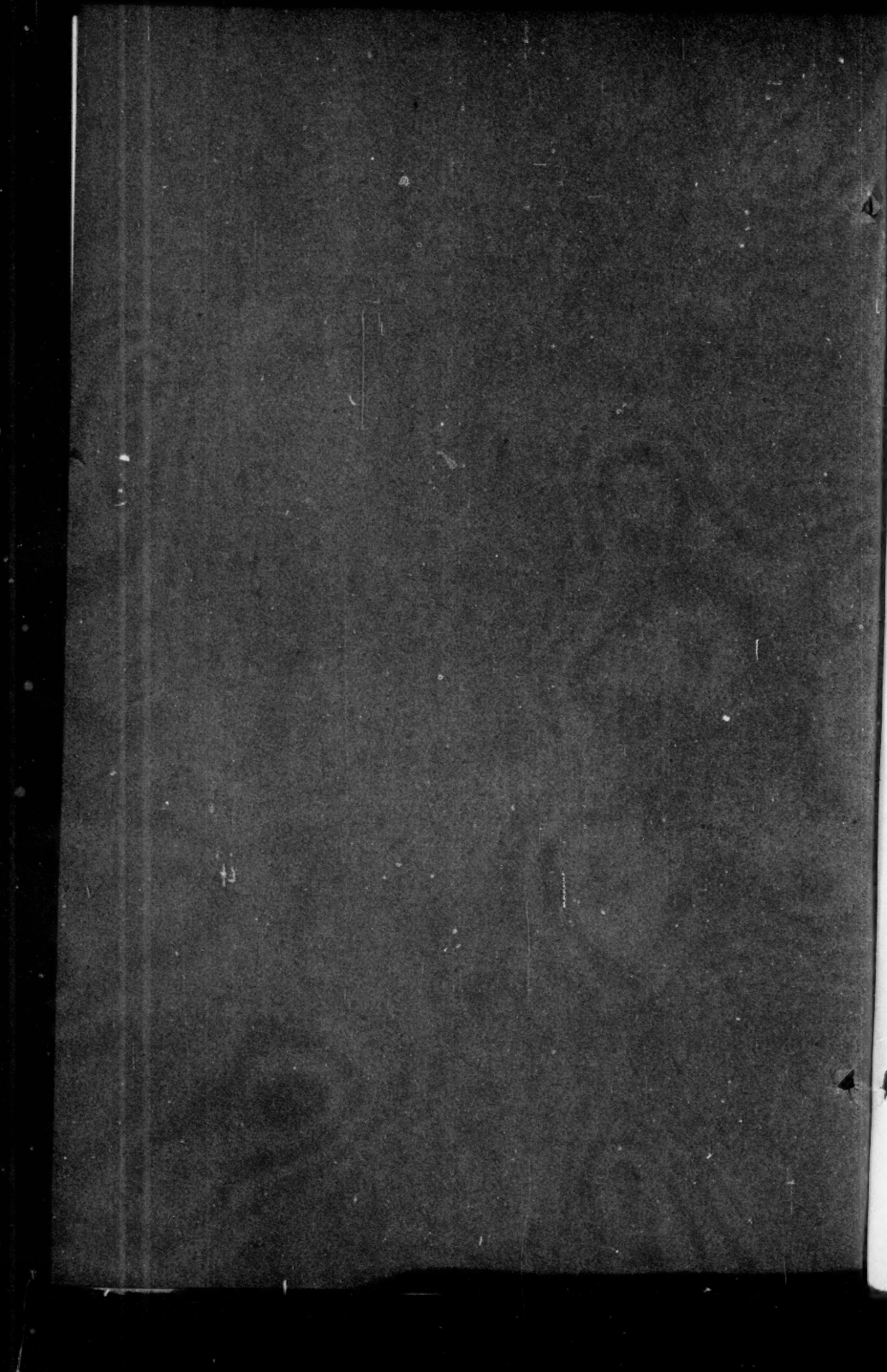

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## BRIEF FOR THE UNITED STATES.

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The question is as to the domicile of the appellant *in October*, 1862, the time of purchasing the cotton whose proceeds are the subject of the present controversy. At that time Saint Landry, in Louisiana, the place of such purchase, was within the confederate *lines*, and New Orleans, where, as is admitted, the appellant had previously resided, was within the Federal *lines*.

The only evidence upon the above question is, that until the breaking out of the rebellion the appellant resided at New Orleans, and that in October, 1862, he was living at Saint Landry, as agent for the Confederate States in the purchase of cotton.

Any *doubts* arising upon this defective statement must be resolved *against* the appellant, within whose particular knowledge the missing facts are, and who, as must

be assumed, would have disclosed them had such disclosure promised him advantage.

Without dwelling upon that, however, it is elementary law that the original domicile remained until changed *animo et facto.*

In the first place it seems that there is nothing in this record for the court here to consider; in other words, no error *in law.* The case, upon analysis, seems to be one in which the appellant has been called upon (*by the presumption of law that his original domicile at New Orleans continued to exist in October*, 1862) to introduce rebutting testimony. The *effect* of such testimony is matter exclusively for the court below. That court has pronounced, substantially, that it is not sufficient to enable them to find the fact otherwise than as presumed by law. If they have erred in this, it is an error of fact, not of law.

Submitting this short point to the judgment of the court, I proceed to notice that the only matter relied upon by the appellant as establishing a change of domicile, is the fact of his being at Saint Landry in October, 1862, *clothed with an official relation to the Confederate States.*

1. It seems evident that in such case the law presumes that the appellant went from New Orleans to Saint Landry *immediately before the time at which he was first found there, i. e.*, that *he arrived at Saint Landry in October*, 1862, *having left New Orleans a few days before, or at soonest in September*, 1862. If the appellant could have produced

proof to the contrary of this presumption he would have done so.

He left New Orleans, therefore, after the Federal lines had inclosed it, for the purpose (as would in any case be *presumed*, and as here he instructs his counsel to say) of pursuing his bent as a rebel.

2. Upon this it is to be remarked that change of domicile is a *lawful* transaction. It seems, then, that migration for an unlawful end will not, *for the purpose of relieving the party from a penalty*, be regarded as involving change of domicile, before tribunals administering the law so broken. At least that such must be the case where such unlawful element is of so grave a character as here, where the migration was for the purpose of facilitating treason, and to overturn the law now appealed to, in the place so left. In order to a change of domicil, the act relied upon for such effect must be consistent with the law of the place abandoned; not a mere physical change of abode, but a change accompanied by a state of mind that such law respects. That is not the case here. The act of departure involved *fraud*, and the law will attribute thereto the consequences of fraud, *i. e.*, will treat it as *null* whenever advantage thereof is sought before its tribunals.

It is according to principles well established in like cases, that such party may, however, involve himself in *disadvantage* before the law by an act which for any purpose of advantage to him will be held void.

I submit that it is the better opinion that a citizen cannot emigrate without the consent of his country, (3 Pet., 246,) and that although such consent is to be presumed in time of peace, there is no presumption to that

purpose when the country is at war, *and* the contemplated change is to the territory of the enemy for the purpose of giving the latter aid and comfort. Such emigration is itself an act of treason committed within the territory from which the person departs, and can confer no rights before the courts of the country deserted.

These remarks are pertinent to the contention of the appellant, viz, that he is to be treated as if, under the same circumstances, he had been found holding office under some foreign government at war with the United States.

Inasmuch as he left New Orleans in September, 1862, after it had reverted to the United States, and for the purpose of taking part in a rebellion then flagrant, the case, according to the hypothesis of the appellant, is the same as if in time of war between the United States and Mexico he had to the same end left New Orleans for Vera Cruz.

The parallel seems (*as against the appellant*) to be exact, for it is conceded that if he had staid in New Orleans, he would be presumed, *conclusively* for every purpose of this cotton transaction, to have been loyal, and could not have unveiled the secrets of his heart to show the contrary. How, then, is it that he acquired the right of being presumed, *for his own advantage*, to have been disloyal. The answer must be: By some act which changed a presumed state of loyalty into a presumed state of disloyalty. To which the fatal objection lies, that no such act can confer any right that a court of the United States is bound to respect.

3. But this does not present the whole strength of the case against the appellant.

The evidence of *fact* and *intention* relied upon by the

appellant to *rebut* (1 Taylor, Ev., p. 208) the presumption that his domicile was still at New Orleans in October, 1862, must show something more than that by the change he had cast in his lot with the rebellion, *i. e.*, with a cause as passing and unstable as clouds at sunset. He who has taken an oath of office to Great Britain has given evidence of his union with a society that is *permanent.* The courts of the United States cannot, *for his advantage,* admit this to have been the case with a former citizen of theirs who took office under the Confederate States, for that was a government of mere force, and therefore, in the nature of things, transitory. The connection with it, therefore, which the appellant had at Saint Landry in October, 1862, is, in the words of Lord Thurlow, to be "referred to *that* occasional and temporary purpose" which prevents mere change of place from affecting a pre-existing domicile. (Bempde *vs.* Johnstone, 3 Vesey, 198.)

This consideration is one entirely aside from the guilt or innocence of the change, proceeding solely upon *an absence of all evidence* that such change was for a purpose not occasional and temporary.

*Ridding the question of all technical terms, there can be no doubt that the appellant left New Orleans in order to fight his way back! That he was kept out of it as long as he was, and that he did not at last come back with arms in his hands, was to him, no doubt, equally a surprise and a grief of mind. How, then, can he claim that he left New Orleans with an intention of staying away?*

I may notice incidentally that the learned counsel for the appellant relies (Brief, p. 4) for proof of a change of

domicile upon the principle that after his accepting office under the Confederate States, "the voluntary residence of the petitioner in New Orleans, after the war began, would have been a crime, and statute evidence of it." The argument is that the law will not *impute* to the petitioner anything that involved *crime*. The true rule seems to be that, while courts may not *supply* a fact which is inconsistent with innocence, they equally will not *supply* one to create innocence. But whatever the rule be, it has no application here, where it is admitted that, whether the appellant were at Saint Landry or at New Orleans, he was in active rebellion. The assumption that he was at New Orleans until October, 1862, cannot increase the guilt of a person who was equally a traitor if at Saint Landry.

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